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Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES A. HOTTENSTEIN, CARL SCHMOYER and ANDREW FEKETY,
Petitioners,

v.

YORK ICE MACHINERY CORPORATION,
Respondent.

No. 1282.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE S. MUNSON,
PHILADELPHIA, PA.
ROBERT H. RICHARDS,
AARON FINGER,
WILMINGTON, DELAWARE.
Counsel for Respondent.

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Charles A. Hottenstein, Carl Schmoyer and Andrew Fekety, Petitioners,

v.

York Ice Machinery Corporation, Respondent.

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STATEMENT OF THE CASE.

A history of the proceedings, stated as concisely as the facts will permit, is required for a proper understanding of the question involved.

Respondent, in January 1941, submitted to its stockholders a plan for the merger into itself of its wholly-owned subsidiary (York Corporation), and for the exchange of its outstanding preferred and common stock for new common stock, on the basis of 15 shares of new common stock for each share of old preferred stock and accrued dividends, and one share of new common stock for each share of old common stock. Promptly thereafter these Petitioners filed in the United States District

Court for the District of Delaware a Bill to enjoin the merger, although they had acquired their stock only in December 1940, being the month previous to the month when the merger plan was announced publicly and after, in fact, the news had been distributed in November 1940, throughout financial circles through the Dow-Jones News Service that the preferred and common stock of the corporation would be exchanged on the basis stated above (R. 52). The injunction suit was tried on the merits in the summer of 1941 before Judge Nields. However, Judge Nields resigned before filing an opinion and the case was heard *de novo* before Judge Watson, who was specially assigned to hear it.

At the trial of the injunction suit, it was claimed (1) that the merger was illegal because Respondent had no power, under the Delaware law, to consummate a merger with a wholly-owned subsidiary and thereby affect the rights of preferred stockholders, and (2) that the terms of the merger were unfair to the preferred stockholders. Evidence was introduced with respect to Respondent's assets, and the testimony showed that the book value of its plant account, as stated on its balance sheet, had been written down in previous years. No evidence was submitted as to the value of the plant account other than its reproduction cost new less depreciation. Other evidence relevant to the issue of unfairness was introduced, which included evidence with respect to earnings, the transfer of voting control of the corporation from the common to the preferred stockholders as a direct result of the merger, and other factors tending to show the fairness of the plan to the holders of both classes of stock. Hottenstein *v.* York Ice Machinery Corp., 45 F. Supp. 436.

The District Court, in an opinion delivered by Judge Watson, dismissed the Bill for Injunction, holding that the merger was legal under the Delaware Law and that the distribution of the stock between the preferred and

common stockholders was not unfair. An intervening preferred stockholder appealed to the Circuit Court of Appeals, which in a unanimous opinion delivered by Judge Biggs on June 15, 1943, affirmed the decision of the District Court. A petition for reargument was filed but was denied.

Petitioners thereupon proceeded under the Delaware statute to an appraisal of their stock. They appointed one appraiser, the Respondent appointed a second appraiser, and the Chancellor, as provided under the Delaware law, appointed a third appraiser. Voluminous testimony, occupying over 700 pages, was taken before the Appraisers (R. 47). The entire record of the testimony in the District Court was presented to the Appraisers. A substantial portion of that testimony was read into the record and the reports of Day & Zimmermann with reference to the business and to the reproduction cost new less depreciation of the plant of Respondent, which had previously been introduced in evidence in the injunction suit, were submitted to the Appraisers (R. 54-60 and Appendix, pp. 4a, 8a). The position proposed to be taken in the appraisal proceedings by the Respondent, which is now claimed to be fraudulent and similar to "false testimony and forged documents", so as to permit the filing of a Bill of Review, was stated at some length by counsel for the Respondent at the hearing before the Appraisers. Robert H. Richards, of the Wilmington, Delaware Bar, after Petitioners' attorneys had made their statements, made on behalf of Respondent a statement which is quoted in part as follows (R. 48-50):

> "'MR. RICHARDS:—Just a moment, please. I would like to make a statement, a very brief one, indicating our position, because the learned counsel on the other side have given their theories, and I think the appraisers [fol. 57] should know what our position is before we hear from them further.
>
> "'You have a simple duty, which may necessitate a good deal of consideration and work on your part

in evaluating and considering the various kinds of evidence that will be submitted to you. Of course you gentlemen are not lawyers, and I am not going to discuss a lot of law with you.

* * * * * * *

" 'The validity of this merger was challenged by my friends and tried and decided by the Judge in the District Court for this district, and decided on review by the Circuit Court of Appeals, and held to be a valid merger, and that is the end of that.* * *

" '* * * The things that are to be considered are all the elements of value that can properly enter into the value of a share of stock—whatever kind it may be; preferred or common—as of a certain date.

[fol. 58] " 'Now, what are those elements? They are market value, asset value, earnings record, dividend record, and any facts known or that may be ascertainable as of that date that would throw some light on the future prospects of the company. Nothing that is actually the result of the merger, as the statute says, can be taken into consideration. But you can take a corporation as of a certain date, and it is possible and conceivable of course that certain facts may be proved that would throw some light on the future prospects of the company, and they are properly considered. But as the Chancellor said in this case where the parties to the case discussed only two of the elements, which were market price and asset value, in the case of Chicago Corporation *vs.* Munds, in 20 Del. Ch. Reports, page 142, in the conclusion of that opinion—I am not going to read it all; it is a very short paragraph in which the Chancellor says:

" 'There is no need at this stage of the case for me to enter upon a discussion of the sort of considerations which should be taken into account in the

valuing of the defendants' stock. Market value undoubtedly is a pertinent consideration. So is net asset value. Neither, however, deserves necessarily to be accepted as exclusive. Those are the only two standards of measure that the respective parties to this cause have insisted upon as governing, and I shall abstain from embarking upon a general discussion touching other possible elements that might under varying circumstances be taken into account'."

" 'Those are two of the elements to be considered, but neither one is exclusive. In other words, the elements of value which an experienced business man who knows something about valuing stock would think proper to be considered in determining the value of the share of stock at a particular date is what you are to consider, * * *'." (pp. 13-17)

Thereafter, Aaron Finger, of the Wilmington, Delaware Bar, also of counsel for Respondent, after the dissenting stockholders had rested their case, made a statement on the record which is quoted in part as follows: (R. 50)

"MR. FINGER:—Before calling our witnesses I would like to say just a brief word.

"The testimony that we are going to present will be that type which we believe is customary and normal to consider in valuing the stock of a corporation. That testimony will be testimony in the form of balance sheets, records of earnings, dividend records, market quotations, and such other factors as usually enter into the value of shares of stock.

"In addition to that testimony we are going to call witnesses who are qualified by training and experience to form an opinion concerning the value of shares of stock, and those witnesses will detail to you the nature of the studies they made and the factors they took into consideration and the con-

clusion at which they arrive as to the value of the stock.

"Before presenting that evidence, however, it seems to me desirable that we clear up somewhat—not at any great length; it will be done very shortly—a situation that was produced at the last hearing.

"So far, practically the only evidence that the appraisers have before them is evidence with respect to asset values or book values. We all know, and our witnesses will testify, that asset values or book values do constitute a factor to be taken into consideration, but that it is only one of the factors, one of the elements, and we think it is a minor factor.

"What we want to clear up, particularly, however, is that this evidence that was presented was presented in such a way as to possibly create the impression that the Day & Zimmerman report was a report giving the opinion of that firm as to the value of the assets of this corporation. The fact of the matter is that this engineering report was presented in connection with a hearing where the problem was entirely different from the problem you have here, namely: a question of fairness [fol. 60] of a plan of merger, the fairness of the terms of the plan of merger. In that connection the report merely shows the reproduction new value of those assets, less depreciation, and as will appear from the testimony that we will read into the record, the proponents of that testimony disclaimed any intention of claiming that that represented the fair value of those assets."

Pursuant to the opening statement of counsel for Respondent, the testimony of three independent experts was heard. They gave their respective opinions as to the value of the preferred stock as of the date when the merger became effective, to wit, June 29, 1942. In arriving at their opinions, the experts stated they had taken into

consideration asset value, earnings record, market value, dividend record and future prospects of Respondent. The evidence of asset value which they took into consideration was the same as that presented in the injunction suit; and all three experts, in giving their opinions as to the value of the preferred stock, stated that, on the basis of asset value *alone,* the value of the preferred stock would be in excess of the call price and accumulated dividends. All three experts testified, however, that they considered asset value of less importance than other factors in determining the value of the stock. In addition, John F. Lebor, Assistant Treasurer of Respondent, testified at length regarding Respondent, its financial and operating conditions, and presented an estimate of future earnings. (Appendix, 6a, 8a.) After mature deliberation the Appraisers, in a majority report, appraised the preferred stock of Respondent at $90 per share as of June 29, 1942 (R. 53).

Petitioners then filed a declaratory judgment suit in the United States District Court for the District of Delaware contending that the award of the Appraisers was invalid and that they were entitled to $197.50 for each share of preferred stock. On August 4, 1944, Judge Leahy dismissed the action, his opinion being reported in Root *et al v.* York Corp., 56 Federal Supplement, 288.

After the Appraisers had made their award, Respondent petitioned the Delaware Chancery Court to compel Petitioners to transfer their stock upon payment of the appraised valuation. A motion to dismiss that petition was denied, from which decision petitioners have appealed to the Supreme Court of the State of Delaware, and that proceeding is still pending (R. 53).

The protracted litigation of Petitioners to have the merger declared illegal has now culminated in the instant proceedings, wherein petitioners have asked leave to file a Bill of Review upon the ground that Respondent in the appraisal proceedings had "impeached the testimony"

offered in the injunction suit, had "committed a fraud" and had "tampered with justice". When the Petition for leave to file a Bill of Review came up for consideration on December 8, 1944, oral arguments were heard by Judges Biggs, Jones and Goodrich, and the Circuit Court of Appeals in a unanimous decision dismissed the petition (R. 80). Petitioners' motion for a reargument was denied (R. 85).

Petitioners have now added to the litigation by presenting to this Court a Petition for Certiorari and have repeated the charge that a fraud has been perpetrated on the Courts.

Due to the necessity of filing this brief within the time prescribed by the rules of this Court, there are included herein references to the Appendix attached to the petition for certiorari, being contemporaneously filed with this Court, to correct a diminution in the record. Such Appendix contains the docket entries in the Circuit Court of Appeals for the Third Circuit and the Reply to the Affidavit of George D. Hornstein, which are not included in the original transcript of record filed herein but which have been certified as a supplement to said record by the Clerk of said Circuit Court of Appeals and forwarded on or about May 31, 1945, to the Clerk of this Court. The documents appearing in said Appendix, being a supplement to the record as stated in the petition for certiorari, contain important statements of fact and extracts from the record in the previous proceedings and are essential to a complete understanding of both the basis of the charges made by counsel for the Petitioners and the defenses interposed on behalf of the Respondent.

THE QUESTIONS INVOLVED.

(1) Where in an injunction suit to restrain a merger the company involved introduced evidence as to the value of its assets as well as evidence of earnings and other evidence relevant to the fairness of the terms of the merger, is fraud committed in a later proceeding to appraise the shares of preferred stock of such company by the introduction of testimony of expert witnesses who gave their opinions of the value of such stock on a certain date, in which opinions values were given for the stock lower than if such valuation were based on assets *alone*, the appraisers also having had presented to them the evidence given in the injunction suit as to the value of the assets, and no other evidence as to the value of the assets, and the witnesses who gave their opinions as to the value of the stock having assumed a value for the assets consistent with the evidence in the injunction suit; the expert witnesses having testified that other factors such as earnings, dividends, past record, future prospects, etc., of an industrial company were more significant than asset values in determining the value of the stock?

(2) Can an estimate of future earnings, as given by one of the experts in valuing the stock, be regarded as proving fraud because that estimate is substantially lower than actual earnings in one of the two previous years; independent of the testimony of other witnesses for the Company predicting higher future earnings?

SUMMARY OF ARGUMENT.

I. THE EVIDENCE AS TO VALUATION OF ASSETS WAS THE SAME IN BOTH THE INJUNCTION SUIT AND THE APPRAISAL PROCEEDING.

II. IN THE APPRAISAL PROCEEDING, RESPONDENT DID NOT PROVE OR OFFER TO PROVE ANY VALUE FOR THE ASSETS THAT WAS LOWER OR OTHERWISE DIFFERENT FROM THE VALUES OF ASSETS PRESENTED BY RESPONDENT IN THE INJUNCTION SUIT.

III. IN THE APPRAISAL PROCEEDING EXPERTS TESTIFIED AS TO THEIR OPINIONS OF THE VALUE OF THE *STOCK;* BUT, IN REACHING THEIR CONCLUSION, THEY CONSIDERED THE SAME EVIDENCE OF VALUES OF ASSETS THAT WAS PRESENTED BY RESPONDENT IN THE INJUNCTION SUIT.

IV. CORPORATE STOCK, PARTICULARLY OF AN INDUSTRIAL CORPORATION, IS NOT PROPERLY VALUED SOLELY ON THE BASIS OF ASSETS. OTHER FACTORS SUCH AS PAST EARNINGS, REASONABLY EXPECTED FUTURE EARNINGS, DIVIDENDS, MARKET VALUES, ETC. ARE MORE SIGNIFICANT.

V. THE ALLEGATION THAT THE EVIDENCE OF EARNINGS GIVEN IN THE APPRAISAL PROCEEDING IS INCONSISTENT WITH THAT GIVEN IN THE INJUNCTION SUIT IS BASED UPON AN ATTEMPTED COMPARISON OF THE AVERAGE OF ACTUAL EARNINGS FOR THE YEARS 1940 AND 1941 WITH A PREDICTION OF FUTURE EARNINGS BY ONE OF RESPONDENT'S WITNESSES IN THE APPRAISAL PROCEEDING, INDEPENDENT OF TESTIMONY OF OTHER WITNESSES FOR RESPONDENT WHO PREDICTED HIGHER FUTURE EARNINGS.

VI. PETITIONERS BOUGHT THEIR STOCK AFTER IT HAD BECOME PUBLICLY KNOWN, THROUGH THE DOW JONES NEWS SERVICE, THAT THE STOCK WAS TO BE EXCHANGED ON THE BASIS OF FIFTEEN SHARES OF NEW COMMON FOR EACH SHARE OF PREFERRED. THUS PETITIONERS BOUGHT INTO THE SITUATION WITH KNOWLEDGE OF THE PLAN AND THEN STARTED SUIT TO ENJOIN THE PLAN. THEY NEVER WERE AND ARE NOT NOW IN COURT WITH CLEAN HANDS.

ARGUMENT.

The charge of fraud is one of the gravest that can be made against parties to proceedings and counsel who have represented them. What are the specific fraudulent acts complained of? They are stated on page 2 of the petition, as follows:

> "In this case, York Ice Machinery Corporation, to avoid issuance of an injunction, against a proposed merger and reclassification of its stock, presented evidence to the District Court that its assets were worth a minimum of $10,000,000 and that its earnings exceeded $800,000 a year (R. 2-3, 8, 11, 70, 76). Certain preferred stockholders (petitioners here and others), relying upon the figures being correct, refused to join in the reclassification and merger and insisted upon an appraisal of their stock. In the appraisal proceeding, they were met with the Corporation's inconsistent claim that its assets had had a value of only $4,000,000 and earnings of less than $490,000 a year (R. 11, 70-71, 78).

Analyzing Petitioners' contention, it has to do with alleged fraudulent claims by Respondent with respect to (*a*) its assets and (*b*) its earnings. It is claimed that Respondent "presented evidence to the District Court that its assets were worth a minimum of $10,000,000" but in the appraisal proceedings Respondent made the claim "that its assets had had a value of only $4,000,000."

Respondent presented no evidence in the District Court that its assets were worth a minimum of $10,000,000. This is borne out by the opinion of Judge Watson, in which he stated "there was no evidence submitted which purported to be an estimate of the actual fair value of the fixed assets of the defendant." Hotienstein *v.* York Ice Machinery Corp., 45 Fed. Supp. 436, 438.

Respondent presented no testimony in the appraisal proceeding "that its assets had a value of only $4,000,000."

On the contrary, the *only* evidence as to value of *assets* that was presented to the Appraisers was the identical evidence that had been introduced in the injunction suit. On the subject of the value of the *stock*, all of the expert witnesses testified that in determining such value they took into consideration not only assets but also management, dividend record, past and prospective earnings, and other relevant factors. The following testimony on cross-examination of Mr. Bancroft, one of Respondent's expert witnesses, illustrates that he was not attempting to give the value of the assets, but was speaking of the value of the stock (Appendix, pp. 6a, 7a):

> "Q. Assuming that that was the fair value and taking a value of $3,800,000, you mean to say that the net worth of this Company was not more than $4,000,000?
>
> "A. I was talking about the value of the stocks of the Company, not the net worth."

To the same effect was the testimony of Mr. Bracken, another of Respondent's expert witnesses, showing that he was discussing the valuation of the preferred stock, not the valuation of the assets, viz (Appendix, p. 7a):

> "X. In your opinion, in June, 1942, a fair offer for this Company would have been four million dollars. Is that right?
>
> A. Well, I said $3,944,000.
>
> X. Close enough. Approximately four million dollars would have been a fair appraisal for the purchase of this whole Company, lock, stock and barrel? That is your opinion?
>
> A. I refuse to say whether that is for purchase or not. I say that is my valuation of the preferred stock, and I give no equity for the common stock other than a very speculative value."

Counsel for Petitioners repeatedly proceeded in their cross-examination on the basis of assuming a valuation

for Respondent by multiplying the number of shares of preferred stock outstanding by the valuation per share set by the expert witnesses and then comparing the resultant figure with the reproduction cost new less depreciation of Respondent's plant account, but the witnesses uniformly stated that asset value was only one factor to be considered in appraising the preferred stock and that in their opinion the most important factor in fixing such a value was the earning power of Respondent, both past and prospective (Appendix, pp. 7a, 8a).

Thus, not only did Respondent make no attempt to present a different valuation for its assets in the appraisal proceeding than that presented in the injunction suit, but, as a matter of fact, there was introduced in the appraisal proceedings all the evidence presented in the injunction suit as to value of assets, and *no other evidence on this subject was presented in the appraisal proceeding.* This evidence was actually considered by the experts, along with other relevant factors, in reaching their determination of the value of the preferred stock; and this procedure was in accordance with the Delaware law.

Petitioners contend, in effect, that their preferred stock should have been valued solely on the basis of asset values. If authority were needed to refute this, the only Delaware decision on the subject of the basis for appraising stock of a dissenting stockholder holds that it is improper to consider asset values alone. *Chicago Corporation* v. *Munds,* 20 Del. Ch. 142, 172 Atl. 452.

Fraud is also charged against Respondent by alleging that Respondent presented evidence in the injunction suit that "its earnings exceeded $800,000 a year" whereas in the appraisal proceedings Respondent claimed that it had "earnings of less than $490,000 a year."

It is difficult to answer with patience such an unfounded allegation.

The testimony in the injunction suit, as stated by Judge Biggs and quoted hereafter, was that Respondent's net earnings in 1940 were $483,121 and in 1941 were

$1,202,000, or an average of actual net earnings for those two years of approximately $800,000 per annum. The net earnings figure of $490,000 a year used by Petitioners was a prediction of *future* net earnings, given by *one* of the expert witnesses (Appendix, p.). The other expert witnesses gave higher estimates, but, of greater significance, the only officer of Respondent who testified in the appraisal proceedings, John F. Lebor, the present Treasurer of Respondent, estimated its future net earnings at $1,500,000 before income and excess profit taxes. The following quotation is from his testimony (Appendix, p. 6a):

"By MR. KANN:

* * * * * * *

RQ. On an amount of that nature what would be the profit before taxes, after all charges except taxes?

A. That I am not prepared to give an opinion on. We hope that we are going to improve the Company's profits.

RQ. You have worked out no percentages as to what the margins would probably be if the volume were on that basis, but have you any personal opinion?

A. I can give you this: in my own responsibility, which is in the field of financial management, I have had to do some thinking on that, and I have personally used a twenty million, 7½ per cent margin of profit, which is better than we have done before. *It is higher than I heard Mr. Bracken testify to this morning.*

RQ. That would be about a million and a half dollars. That would be before taxes?

A. Before taxes? No, after all taxes except taxes based upon income—that is, Social Security, and all that. Everything except income and excess profit taxes."

One reading the Petition for Certiorari would naturally assume that the comparison of earnings figures of $800,000 a year and $490,000 a year were upon the same basis. The Petition gives no indication that the figure of $800,000 a year was actual *past* earnings for the years 1940 and 1941 and that the figure of $490,000 a year represented the prediction of *one* witness of *future* earnings or that other witnesses predicted higher earnings, or that the only officer of Respondent who testified on the subject gave a higher estimate.

A studied attempt seems made to persuade the Supreme Court that the earnings being compared are comparable. Without qualification Petitioners have indicated, inferred or suggested to the Court, in substantiation of their claim of fraud, that the earnings to which they refer are of the same character and are therefore capable of being set one against the other. The charge of fraud against Respondent in the conduct of these proceedings is proclaimed again and again, but when the facts are examined, the true character of the nature of the Petition is exposed.

The Petition (p. 5) speaks of an

> "estimate of earnings which so impressed the District Court, 45 F. Supp. 436, 438, and the Circuit Court of Appeals, 136 F. (2d) 944, 952, • • •".

As to the District Court, that it was not so impressed is demonstrated by the following quotation from the opinion:

> "The evidence with regard to the earnings of the defendant is similarly inconclusive. *Neither side offered testimony as to the probable future earnings of the company.* The evidence received dealt only with the past earnings of the company up to September 30, 1941. While the past earnings of a corporation are ordinarily of considerable value in esti-

mating probable future earnings, in the present case they are insufficient to form the basis of anything but the wildest guess as to the probable future earnings." (Emphasis ours.)

As to the Circuit Court of Appeals, that Court made no reference to estimates of future earnings, but only to past earnings. Judge Biggs referred to this subject of earnings as follows:

> "An examination of the income account of the defendant year by year for the five years ending September 30, 1940, shows its operations resulted in net income in 1940 of $483,121, in a loss in 1939 of $185,076, in a loss in 1938 of $119,753, in net income in 1937 of $957,649 and in net income in 1936 of $165,586. The financial statement of the defendant also shows a net income of $1,202,000, for 1941. The earned surplus for this year was in excess of $800,000 contrasting with an earned surplus of $403,000 for the year 1940."

Such then are the allegations of fraud charged against Respondent.

A comparison has been made by Petitioners with the use of "false testimony and forged documents", but the record demonstrates the complete absence of justification for the charge, or for the intemperate language which pervades the petition.

CLEAN HANDS.

All three petitioners acquired their stock in December 1940, being the month previous to the month when the merger plan was announced publicly and after news that this preferred stock was to be exchanged for new

common stock on a fifteen for one basis had became known in financial circles through the Dow Jones News Service in November, 1940 (R. 52). Having thus bought into the situation with knowledge of the plan, they proceeded to attack it by bill for injunction filed before the meeting of stockholders called to act on the plan (R. 9, 12-16). They therefore never were and are not now in court with clean hands. *Windhurst* v. *Central Leather Co.* (101 N. J. Eq. 543—1927), 138 Atl. 772, 775.

Incidentally, Petitioners' cost for the stock seems to have been not more than $46.00 per share (R. 52). The award in the appraisal proceeding gave them $90.00 per share (R. 53).

REPLY TO PETITIONERS' ARGUMENT.
(Pg. 12 of petition and brief.)

Petitioners attempt to make three points in their brief.

The first point is that the decision of the Circuit Court of Appeals is in conflict with the only applicable decision in Delaware. This statement is not true. The case referred to, Chicago Corporation *v.* Munds, 20 Del. Ch. 142, 172 Atl. 452, does not hold that the decision of the appraisers in an appraisal proceeding under the Delaware statute is "neither final nor binding". The court could have had no power so to hold when the Delaware statute says that such an appraisal "shall be final and binding". The effect of what the case decides is that, when in such a proceeding the appraisers refused to consider any evidence as to the value of the stock being appraised except the market price thereof, it was not such an appraisal as is contemplated by the statute. The decision was on a motion for judgment on pleadings. The Chancellor contemplated there would be further proceedings in the case. There were none because the case

was settled. If the case had gone to final decree on the merits with the same facts as those considered in the Chancellor's opinion, the final relief undoubtedly would have been that the Chancellor would have ordered a new appraisal.

The second point is based on the assumption that the Circuit Court of Appeals in this case found that Respondent had been guilty of fraud. The Circuit Court of Appeals made no such finding.

The third point is based on the assumption of the soundness of both the first and second points. Since both these points are unsound, the third point necessarily falls.

There is no public interest involved in this case. It is merely one of the usual disputes that frequently follow merger proceedings between corporations. It is a controversy pressed by persons who, *with knowledge* of a plan of recapitalization then under consideration by Respondent, acquired stock in Respondent and proceeded to attack the plan, but have found Respondent as determined to resist their harrassment as Petitioners are persistent in pursuing their objective, whatever it may be.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

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Dated June 5, 1945.